

The Appeals Board (Board) has adopted the stipulations listed in the Award. The Board has also considered the record listed in the Award, except for the May 11, 1999, preliminary hearing and the September 2, 1999, motion hearing transcripts that were listed as part of the record in the Award. The parties, at oral argument before the Appeals Board, stipulated that neither of those transcripts nor attached exhibits should be listed or otherwise considered as part of the evidentiary record in this case.

### ISSUES

The Administrative Law Judge (ALJ) found claimant suffered a left knee injury as a result of a December 17, 1996, fall while working for the respondent. Thereafter, the ALJ found that as the natural and probable consequence of the work-related left knee injury, claimant also suffered permanent injuries to his right knee and his low back. Although restricted, claimant returned to his foreman job and was able to perform those job duties with assistive bilateral knee braces. Thus, work disability was not an issue. The ALJ awarded claimant a 37 percent permanent partial general disability based on a whole body permanent functional impairment.

On appeal, respondent and its insurance carrier, Indiana Lumbermens Mutual Insurance Company (Indiana Insurance Company), agree that claimant suffered a permanent left knee injury in a fall on December 17, 1996, while employed by the respondent. But they contend that claimant's right knee and low back injuries are not the natural and probable consequence of claimant's December 17, 1996, left knee injury. Instead, they argue claimant's right knee and low back injuries are the result of claimant's everyday work activities he performed after he returned to work from treatment of his left knee injury. Claimant alleged a date of accident of December 17, 1996, and each and every working day thereafter through approximately November 1, 1998. Respondent and Indiana Insurance Company contend that the liability for workers compensation benefits due claimant in this claim can only be assessed based on claimant's condition and benefits accrued through November 1, 1998, because claimant continues to suffer increasing aggravating injuries as he continues to perform his regular foreman job duties to the present time. Therefore, respondent and Indiana Insurance Company argue that as of November 1, 1998, claimant's work-related permanent injuries entitled claimant to only a 24 percent permanent partial general disability award. Thereafter, respondent argues that claimant's continuing work activities aggravated claimant's condition resulting in a new accident that increased claimant's permanent functional impairment to 37 percent.

The ALJ entered the Award on October 4, 2000. The attorney for respondent and insurance carrier, Indiana Insurance Company, after the Award was entered, filed an Application for Hearing on October 19, 2000, alleging a date of accident of December 17, 1996, and each and every working day thereafter up through and including the present. The insurance carrier identified for this period of accident was CNA Insurance Company. Because of this application, CNA Insurance Company appeared at oral argument before the Board. The workers compensation insurance coverage period for Indiana Insurance Company ended on December 1, 1998 and CNA Insurance Company began its coverage on December 2, 1998. Indiana Insurance Company admits it is liable for all workers compensation benefits owed claimant for permanent injuries he suffered up through their coverage period of December 1, 1998. After December 1, 1998, it argues that CNA Insurance Company is liable for all workers compensation benefits owed claimant as a

result of new and separate accidents claimant continues to suffer because of his continuing work activities.

Conversely, claimant contends, after he had surgical treatment for his left knee injury, he returned to work and as the natural and probable consequence of the left knee injury, he suffered a right knee and a low back injury. Claimant argues, since he returned to work, he has not sustained a separate and new accident either at work or away from work that would have caused the additional right knee and low back injuries. Those injuries developed because claimant favored the injured left knee which then caused an antalgic gait. Thus, claimant concludes that the ALJ's 37 percent permanent partial general disability award with the December 17, 1996, accident date should be affirmed.

The two issues for Board review are claimant's accident dates and the nature and extent of claimant's disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds that the ALJ's finding that claimant sustained a 37 percent whole body permanent functional impairment as a result of permanent injuries he sustained in the December 17, 1996, work-related accident while employed by the respondent should be affirmed. The Board further finds the Award sets out findings of fact and conclusions of law in reference to those issues that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own as if specifically set forth herein.

In particular, the Board agrees with the ALJ that claimant proved he suffered a traumatic fall at work on December 17, 1996. As a result of that fall, claimant twisted his left knee causing a tear in the medial meniscus. After conservative medical treatment failed to resolve the pain and discomfort in claimant's left knee, orthopedic surgeon Dr. Tyrone D. Artz performed arthroscopic surgery on April 11, 1997, to repair the torn medial meniscus. Claimant then returned to work and because the pain and discomfort continued in his left knee, Dr. Artz performed additional arthroscopic surgery on August 8, 1997.

Claimant again returned to work, this time with the assistance of a knee brace. Dr. Artz continued to treat claimant's symptomatic left knee. He also noted, during a December 10, 1997, visit, that claimant was having some right knee and low back complaints as a result of stress being placed in those two areas because of claimant favoring the painful left knee.

Because claimant's left knee remained symptomatic, Dr. Artz referred claimant to orthopedic surgeon Bradley W. Bruner, M.D., who specializes in treatment of knee injuries. Dr. Bruner first saw claimant on March 9, 1998. Dr. Bruner initially treated claimant's left knee with injections, placed claimant in a physical therapy program, placed claimant in a pool therapy program at the YMCA, and prescribed anti-inflammatory and pain medications. Claimant also continued to have right knee complaints. Dr. Bruner had claimant undergo an MRI examination of the right knee that showed a partial tear in the medial meniscus. On August 12, 1998, Dr. Bruner performed arthroscopic surgery and repaired the right knee medial meniscus tear.

Dr. Bruner returned claimant to work on September 14, 1998, with permanent restrictions of no lifting over 30 pounds; no prolonged standing or walking; no excess bending or twisting; no kneeling or squatting and limited climbing of stairs and ladders. The doctor also placed claimant in bilateral counterforce knee braces, prescribed special work shoes for claimant to wear in the winter and special tennis shoes for claimant to wear in the summer. During the time that claimant was being treated by Dr. Bruner, he continued to have low back complaints. Dr. Bruner referred claimant to physiatrist Pedro A. Murati, M.D. for treatment for low back complaints.

Dr. Murati first saw claimant on May 12, 1999. On May 14, 1999, Dr. Murati performed a NCS/EMG which determined that claimant had bilateral S-1 radiculopathy. Dr. Murati's impression was lumbosacral strain with bilateral radiculopathy.

Dr. Murati testified in this matter by deposition on March 8, 2000. He related claimant's lumbosacral strain with bilateral S-1 radiculopathy to his antalgic gait caused by his bilateral knee injuries. Dr. Murati placed claimant in a physical therapy program, prescribed a TENS unit for pain, prescribed anti-inflammatory and pain medications. He released claimant from his care for the lumbosacral strain and radiculopathy on August 25, 1999. Dr. Murati continued claimant on medication and use of the TENS unit for pain. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, (AMA Guides), DRE Lumbosacral Category III, he assessed claimant with a 10 percent whole body permanent functional impairment for his permanent low back injury.

Dr. Bruner testified in this case by deposition on April 27, 2000. Dr. Bruner had last seen claimant on January 4, 2000. At that time, claimant still had significant knee discomfort. The doctor found claimant in need of new knee braces and concluded that claimant would continue to need knee braces and special work shoes renewed yearly. Dr. Bruner had claimant return for another appointment in 12 months.

Dr. Bruner opined that the December 17, 1996, work-related accident caused the torn meniscus in claimant's left knee. Then as the result of that left knee injury, claimant favored the left knee putting new pressure on the right knee. The right knee then developed a meniscus tear. The bilateral knee problems then affected his gait and caused

his low back problems. Dr. Bruner was asked whether claimant's current permanent functional impairment and need for future medical treatment was the result of the original accident, his regular work duties performed after the original accident up to December of 1998, or claimant's continuing work activities up to the present. Dr. Bruner concluded, "I think that he (claimant) has some microtrauma to his knee but not what I consider new significant injuries."

During Dr. Bruner's deposition, he also expressed his opinion on claimant's whole body permanent functional impairment as a result of claimant's permanent bilateral knee and low back injuries. In accordance with the AMA Guides, Fourth Edition, Dr. Bruner opined that claimant's left lower extremity had a 43 percent permanent functional impairment and claimant's right lower extremity had a 41 percent permanent functional impairment. Those lower extremity ratings were then converted to 17 percent and 16 percent whole body permanent functional impairment ratings and combined for a 30 percent whole body rating. Dr. Bruner adopted Dr. Murati's 10 percent whole body functional impairment rating for claimant's lumbosacral strain and radiculopathy and combined those ratings for a 37 percent whole body permanent functional impairment rating.

In a workers compensation case when the primary injury, in this case the left knee injury, is a compensable injury, then every natural consequence that flows from the primary injury, including a new and distinct injury is compensable if it is the direct and natural consequence of the primary injury.<sup>1</sup> But where a new and separate accident aggravates or worsens the preexisting injury this constitutes a new and separate injury and is not the direct and natural consequence of the preexisting injury.<sup>2</sup>

Here, the Board concludes that the greater weight of the evidence, as established through claimant's testimony and Dr. Bruner's and Dr. Murati's medical opinions, prove that claimant's right knee and low back injuries are the direct and natural consequence of the claimant's December 17, 1996, work-related left knee injury. The Board further finds claimant's ongoing work activities after he returned to work from his left knee injury did not constitute a new and separate accident resulting in additional permanent injury to claimant.

The Board finds that the Application for Hearing filed by respondent and Indiana Insurance Company was filed after the ALJ entered the Award and therefore is not part of the ALJ's record on appeal and cannot be considered by the Board on appeal. Additionally, because the Board affirmed the ALJ's finding that all of claimant's permanent

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<sup>1</sup> See Reese v. Gas Engineering and Construction Co., 219 Kan. 536, Syl. ¶ 4, 548 P.2d 746 (1976) (Claimant's injured left leg caused not only a disability to the left leg but also a disability to the back which was a direct and natural consequence of the physical damage to his left leg).

<sup>2</sup> See Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

injuries resulted from the December 17, 1996 accident, respondent and its insurance carrier, Indiana Insurance Company's effort to claim another date of accident is moot.

The Board does note that the ALJ failed to limit the award for permanent partial general disability to the \$50,000 statutory maximum because the permanent partial disability was based on permanent functional impairment.<sup>3</sup> Therefore, the total award including temporary total disability benefits amounts to \$57,642.18 instead of the \$58,588.92 contained in the ALJ's Award.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' October 4, 2000, Award, is affirmed for the 37 percent permanent partial general disability but the amount of permanent partial general disability is modified to the statutory maximum of \$50,000 instead of the \$50,946.74 amount awarded by the ALJ.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Timothy A. Wohler and against the respondent, Allen Millwork Company, , and its insurance carrier, Indiana Lumbermens Mutual Insurance Company, for an accidental injury which occurred on December 17, 1996, and based upon an average weekly wage of \$800.

Claimant is entitled to 22.61 weeks of temporary total disability compensation at the rate of \$338 per week or \$7,642.18 followed by \$50,000 of permanent partial general disability compensation to be paid at \$338 per week for a 37 percent permanent partial general disability, making a total award of \$57,642.18, which is all due and owing and is ordered paid in one lump sum minus any amounts previously paid.

Respondent is ordered to pay all authorized medical expenses.

Claimant is entitled to an unauthorized medical allowance in the statutory maximum of \$500.

Claimant is entitled to future medical treatment upon proper application approved by the Director.

All remaining orders contained in the Award are adopted by the Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

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<sup>3</sup> See K.S.A. 44-510f(a)(4) (Furse 1993)

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BOARD MEMBER

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- c: Steven R. Wilson, Attorney for Claimant  
Michael J. Haight, Attorney for Respondent and Indiana Lumbermans Mutual Insurance Company  
Matthew Thiesing, Attorney for Respondent and CNA Insurance Company  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director